

November 26. 1765.



A N S W E R S

F O R

Janet Miller and *George Barclay* Merchant in *Lanerk*, her Husband, *Isabel, Jean, and Janet Aikmans*, Daughters, and only Children procreate betwixt the deceased *Andrew Aikman* Surgeon in *Biggar*, and the also deceased *Margaret Millar* his Spouse, and *Andrew Forrest*, Merchant in *Edinburgh*, Husband to the said *Jean Aikman*;

T O T H E

PETITION of *Mary Dickson*, Relict of the deceased *George Muirhead* of *Whitecastle*, now Wife to Mr *John Noble* Minister of the Gospel at *Libertoun*, and of him for his interest.

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THE lands called *Parson's lands*, whereof the greatest and most valuable part consists of burgage-acres, immediately adjacent to the burgh of *Biggar*, were in ancient times part of the patrimony of the parson of *Biggar*, and were thereafter feued out to be holden of the parson for a certain rent or feu-duty.

And, to go no further back than the 1655, it appears, that Mr *Alexander Livingston*, parson of *Biggar*, *qua* superior of said lands, with consent of the Earl of *Wigton* as patron of the church of *Biggar*, granted a charter of these lands to Mr *John Muirhead* Advocate, his heirs and assignies what-

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ever, to be holden of him the parson and his successors in office, for payment of the feu-duty therein mentioned; and that Mr John was thereupon infest.

These lands of Parson lands made but a small part of Mr John Muirhead's estate; he was, at the same time, proprietor of the lands of Whitecastle, in the parish of Libberton, of the lands of Baitlaws, in the parish of Quathquhan, and four oxgates of Hill-end, in the parish of Biggar. The petitioner is now in possession of all these, upon the title of the general disposition to be hereafter mentioned, which she obtained from the late George Muirhead of Parson lands, her husband, excepting the lands of Baitlaws, which she has lately sold for about 18,000 merks, to clear the debts; the other lands which she retains yielding about 200 *l.* Sterling of yearly rent.

Mr John Muirhead died about the year 1711, and was succeeded by the now deceased George Muirhead his grandson and apparent heir; and as part of the other lands held of the Earl of Wigton, he was prevailed upon to accept of a precept of *Clare constat* from the Earl, for infesting him in these lands of Parson's lands, as heir to his grandfather, upon a false or erroneous averment, *That said lands, formerly holden of the parson of Biggar, did now hold of said Earl as patron of said College-church, and his successors, in feu-farm and heritage, for ever*; and of this date the said George Muirhead was infest upon the aforesaid precept.

3d May
1711.

The said George Muirhead intermarried for the second time with the petitioner Mary Dickson, and by the marriage-contract she was provided to a free yearly annuity of 1800 merks. But, not satisfied with this, as there happened to be no issue of this marriage, and as she had got greatly the ascendant over her husband, which is easily accounted for from the inequality of their ages, and his known facility; she elicited, from time to time, several deeds, all in her own favour, whereby the whole estate, heritable and moveable,

moveable, which then did, or should pertain to him at his death, was gratuitously disposed to her, in exclusion of all his blood-relations; and such, in particular, was the tenor of the last disposition elicited from him, 19th January 1748.

By George Muirhead's death the succession to this whole estate, did of right belong to Margaret and Katharine Muirheads, the grand-daughters of Mr John Muirhead, and sisters of George Muirhead; but as hitherto they had no access to know, nor indeed any title to inquire how, or in what manner he had made up his titles, and knew nothing of the deeds elicited by the petitioner; these ladies, in whose place the respondents now stand, did, recently after Mr George Muirhead's death, make application to this petitioner, to know what titles he had established, or what deed he had executed; and it is certain fact, of which if necessary the clearest proof can be brought, that she made repeated appointments, time after time, with them and their doers, to give the inspection demanded; but which she always broke upon some frivolous pretence, such as her expecting her brother Mr David Dickson to be present.

These ladies entertained no suspicion at the time, that any thing unfair was intended by these off-puts; and the respondents are unwilling to believe, that it was with any view to the advantage that is now endeavoured to be taken, viz. the outrunning of the forty years from the period of Mr George Muirhead's infestment in the 1711, however evident it now is, that, had these ladies got inspection of the papers when required, and as she promised, they must have had it in their power to have delivered themselves of this danger by the bare executing of a summons.

Such being the nature of the petitioner's right, and such the means by which she was put in condition to avail herself of the plea of the positive prescription, in support of one of the most irrational deeds that ever was granted, your
 Lordships

Lordships will not be disposed to bestow upon it one degree of favour beyond what the law necessarily requires.

George Muirhead died upon the 2d of February 1751, without revoking this most irrational deed; which therefore must stand good as to the whole other subjects thereby disposed, and soon operated the effect principally intended, *viz.* that of procuring the petitioner another husband, Reverend in possession, but not so Reverend in years as her former husband.

But, as to this parcel called the *Parson-lands* of the parsonage of Biggar, the heirs of line being advised, that the title which George Muirhead had established to these by the aforesaid precept of *Clare* and infestment, from the Earl of Wigton, was erroneous and void; and therefore that, *quoad* these, George Muirhead died in a state of apparency, and could not gratuitously dispoise the same to this petitioner; they brought a challenge accordingly.

It was pleaded by way of defence, That as by the statutes 1567 and 1592, lay-patrons were authorised to dispose of their provostries, &c. for the education of bursters in colleges; and that by the statute 1661, the patrons of these provostries, &c. were constituted superiors to the vassals of these, whereby the Earl of Wigton, as patron of the church of Biggar, became superior of those lands which held of the parson, and consequently was intitled, *proprio jure*, to grant the foresaid precept and infestment; and that a proper title being thereby established in the person of George Muirhead, his disposition was not liable to challenge on that account.—*2dly*, That supposing the precept and infestment to have been originally erroneous, as it had stood unquarrelled for the space of forty years, and had been the title of possession all that time, the right was established by the positive prescription; and that tho' George Muirhead himself, the person infest, died some weeks within the forty years, computing from the 3d of May 1711, the date of the infestment,

infestment, the defenders possession, under the aforesaid disposition in her favours, before that the summons of reduction at the pursuers instance was executed, must be available to compleat the positive prescription; and, after various proceedings unnecessary now to be stated, the debate upon these points being taken to report, your Lordships of this date, pronounced the following interlocutor. “ On re-^{6th Aug.}
 “ port of Lord Elliock, the Lords find, That the lands in ^{1765.}
 “ question held of the parson of Biggar *qua* parson; and
 “ that the precept taken, and the title made up, by George
 “ Muirhead in the year 1711, was erroneous and void, re-
 “ pel the defence of prescription, and decern.”

The *first* branch of this interlocutor is acquiesced in; but the other branch thereof, *repelling the defence of prescription*, is brought under review by the petitioners, now to be answered.

And as an introduction to the argument upon that point, the petitioner sets out with an averment in point of fact. *1st*, That “ George Muirhead died in the natural possession
 “ of these lands, which consist but of a few acres, the ex-
 “ tent of which cannot possibly be ascertained, and that
 “ she the petitioner continued the possession after his
 “ death, upon the title of the foresaid disposition. *2dly*,
 “ That upon supposition of her being proprietor, she has
 “ paid of her husband’s debts to an amount exceeding
 “ the value of these lands.”

What the petitioner intends by the alledged impossibility of ascertaining the extent of these, is to the respondents incomprehensible. That is the proper business of the respondents. It would be a very idle dispute indeed, if the subject itself, about which the struggle is made, could not be known. Whether it consists of a greater or lesser number of acres, is not material to the issue, further than what respects the article of possession, in order to compleat the positive prescription; and in that view only the respon-

dents aver and say, and which, if necessary, they will prove, that excepting some small parcels of these lands, immediately adjacent to the house of Parsonlands, which were in George Muirhead's natural possession at the time of his death, the most valuable part of these lands, consisting of the cott-acres, adjacent to the town of Biggar, and some other parcels lying at a greater distance, were let for rent, and in possession of the tenants. And consequently, that as George Muirhead died upon the 2d of February 1751, this petitioner neither had nor could have any possession of those parts of the lands set in tenantry before the execution of the pursuers summons, upon the 27th day of June thereafter; when, by the most rigorous computation, the forty years from George Muirhead's infeftment, 3d May 1711, were just expired; and your Lordships have heard by what unfair means these few days were gained.

Any possession that the petitioner can pretend to have had from her husband's death till the executing of the summons, was no other than what from decency, *et ex comitate*, is generally allowed to widows, where their husbands die between terms, *viz.* of continuing their residence in the mansion-house, wherein their husband died, and of the grounds in his natural possession whereon he had his stock of cattle. No positive act is so much as alledged of her assuming possession even of the lands about the house, prior to the execution of the summons, far less of the other lands set out to tenants. No infeftment was taken upon the disposition, nor was any intimation made thereof. The rents payable by the tenants at the Whitsunday following, were for the last half of crop 1750, and thereby fell under George Muirhead's executry; and supposing them to have been due for the first half of crop 1751, no payment had been made of these when the summons was executed; so that whatever pretence the petitioner may have of a *quasi* possession of the lands in George Muirhead's natural

tural possession; yet, as to the most valuable part of these lands set in tenantry, she neither had nor could have any possession before executing the summons. The law, *presumptione juris*, continues the predecessor's possession in the person of the apparent heir. The tenants possession was therefore the possession of the apparent heir; so that the petitioner's imaginary possession, as upon the title of the disposition in her favours, without any ouvert act or deed of her's to that purpose, can never be conjoined with George Muirhead's possession, to compleat the prescription, thereby to cut out the right of that heir to whom the law transfers the legal possession; and if this principle is just, it removes at once the very foundation of the petitioner's plea of positive prescription, by the conjunction of her supposed momentary possession with that of George Muirhead's own.

But in answer more particularly to this plea of positive prescription, the respondents beg leave to observe, That, as it is a creature of the law, introduced and established by the statute 1617, a distinction is thereby made between the title of singular successors and heirs, whereby, as there can be no prescription without a proper title, the title required in singular successors is a charter of the lands, with instrument of feifine following thereon, cloathed with forty years peaceable and uninterrupted possession: Whereas, in the case of heirs, the statute rests satisfied with instrument of feifine, one or more, continued and standing together for the like space of forty years, proceeding upon retours or precepts of *Clare constat*.

The petitioner contends, That her case falls under the first alternative; for that a precept of *Clare* is in reality a grant of the lands by the superior, and, *quoad* the title of prescription, equal to an original charter. That as this precept, if granted by the true superior, would have been an unexceptionable good title, any defect of power in Lord Wigton to grant that precept is supplied by the positive prescription.

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The respondents can by no means subscribe to this doctrine. They are advised, That, as the statute justly distinguishes betwixt singular successors and heirs; and, with respect to the first of these, requires a charter, under which, the respondents shall admit, is comprehended every disposition or grant of property upon which investment could follow, such as a disposition containing precept of investment, tho' without a charter; so, in the other, it requires *connected seifines*, proceeding upon precepts of *Clare* or retours.

And altho' the statute, in this last branch, rests satisfied with the seifines themselves, proceeding upon precepts of *Clare* or retours, without requiring production of the precepts of *Clare* or retours themselves, from a reasonable presumption, in the case of heirs continuing their predecessors possession, that where the seifines bear to proceed upon precepts and retours, such did truly exist, and were the warrants of the seifine; it will by no means follow, that the production of a precept of *Clare* or retour is equal to a charter, so as to take the case from under the second, and bring it within the first branch of the statute. If the law, in the case of heirs, relies upon continued seifines, bearing to proceed upon precepts of *Clare* and retours standing unquarrelled for so many years as the title of possession, is presumptive legal evidence that these seifines had a proper warrant, and therefore dispenses with the production of these; it seems incongruous to argue that the precept of *Clare* or retour, which can only apply to the case of heirs, should be equivalent to a charter required by the first branch of the statute, in the case of singular successors, any more than that the charter required by the statute, as the title of singular successors, should be transferred to the case of heirs in the second branch.

If this principle is just, the petitioner does not properly qualify her defence upon the positive prescription.—George Muirhead

Muirhead was no singular successor.—He succeeded *qua* heir.—She produces no charter or other original right in his person equivalent thereto, as required in the case of singular successors: And considering him as an heir, she does not produce connected infeftments, proceeding upon precepts of *Clare* or retours, for the space of forty years. A precept of *Clare* contains no grant of the lands. It imports no more but an authority from the superior to introduce the heir into the actual possession of his supposed predecessor. Precepts of *Clare* and retours are in this respect held to be equivalent; seifines proceeding upon these, continued and standing together for the space of forty years unquarrelled, are, in the case of heirs, equivalent to charters and infeftments in the case of singular successors: So that the titles required by the one cannot be transferred to the other.

And as a consequence of this, the respondents humbly contend, That, as the forty years were not elapsed during the lifetime of George Muirhead, as there was no renewal of the infeftment in the person of any other heir, the petitioner's supposed possession after her husband's death, *esto* it had been of the whole lands, and ascribable to the disposition in her favours, cannot conjoin with her husband's possession to give her the benefit of a positive prescription: There is no authority for a conjunction of this kind in the words of the statute, in the case of heirs, which requires connected seifines, proceeding upon precepts of *Clare* or retours; and therefore singular titles, not-completed by infeftment, cannot be conjoined with seifines upon precepts of *Clare* and retours, in order to found the positive prescription allowed of in the case of heirs.

But allowing, for argument's sake, that the precept of *Clare* and infeftment 1711, should be held a good title of prescription in this case, and that the same had been cloathed with forty years possession, both which propositions the respondents have taken the liberty to contest: And further,

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supposing, that, in competition with third parties, these might be sufficient to found the petitioner in the plea of positive prescription, they can by no means agree that they are *termini habiles* for a plea of this kind, in a question with the respondents, the heirs of line.

George Muirhead had a double title to the possession of these lands. He was heir of line, and heir of provision by the last investiture 1655; which, independent of any grant from the superior, was a proper and legal title of possession; and therefore, tho' he accepted of the erroneous precept from the Earl of Wigtoun, as supposing him to be the right superior, his possession can with no justice be ascribed to that title, now finally adjudged to be erroneous and void, whilst he had at the same time a proper and legal title in his person. Where two titles vest in one and the same person, if both are legal titles, the law will ascribe the possession to both, and prescription will not operate for the one in prejudice of the other. But where one title is proper, and the other improper, law, justice, and common sense must ascribe the possession to the proper title; and tho', in a question with third parties, possession under either of these may be available to support the right; yet, with regard to the party himself and his heirs, the possession must be imputed to that title which gave the proper right.

No man can by possession *prescribe against himself* or his right heirs, more than his right hand can prescribe against his left. It is implied in the very idea of prescription, that some right is to be thereby acquired, and that there should be some person against whom that prescription is to run, whose right is to be thereby cut off, and who must be intitled to interrupt the same. Both parties, respondents as well as petitioners, *are agreed*, that this estate was the undoubted property of George Muirhead; he could therefore acquire no better or broader right by prescription than he had before, or was originally inherent in him. His
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apparency *qua* heir of the former investiture was a legal title of possession; but he made up his titles erroneously, and that erroneous title made *no alteration in the destination of heirs*; and as he could not by that possession prescribe *against himself*, as little could a prescription be thereby established against his right heirs; while both titles centred in him, the possession could not benefit the one in prejudice of the other; and where the one title was proper, and the other improper, the law must consider the possession as held under the proper title.

The doctrine established by the decision, in the case of Mackerston, and some other later cases, is no infringement of this general rule. In all these cases, tho' both rights centred in the same person, there was a manifest benefit and advantage to be acquired under the one title in preference to the other. The fetters of an entail were to be knocked off; a fee-simple was to be acquired, instead of a tailzied estate; and therefore the law might justly ascribe the possession to the preferable right; tho', even in these cases, the point was held extremely doubtful. The principle was carried as far as it could possibly be stretched; and it is believed your Lordships will not be disposed to carry it further. But to extend this to the case in hand, *where nothing was to be acquired* under the one title more than the other, and *where there was no person against whom that prescription could be said to be running*, or whose right could be cut off, and consequently no person to interrupt, seems, with all due submission, a very extraordinary doctrine.

The petitioner admits, that the prescription could not run against the heirs of George Muirhead, while he himself was possessing in fee-simple, when both the former investitures and the erroneous precept carried the estate to the heirs of line: But she is pleased to say, that as the same person was both heir of line to George Muirhead himself, and heir of the investiture to John Muirhead the father, the prescripti-
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on might run for them in the one character, tho' against them in the other. This is very ingenious, but to the respondents quite incomprehensible. Something might have been said, had the one title been more beneficial than the other, or the writs devised to different heirs. But where both were the same, the one right no better than the other, the one title proper, the other improper, it sounds oddly, that the improper title should be established by prescription, and the proper title cut off; and so this point was expressly judged in two very noted cases, the one respecting the succession to the estate of Dundonald, 26th January 1726, the other more recent, *Smith contra Gray*.

The first of these is to be found in the collection of remarkable decisions from the 1716 to 1728, to which the respondents will beg liberty to refer. But the other is so directly in point, and was so solemnly decided, that the respondents will be forgiven to be more particular in stating the same.

James Carbarns, by charter from the crown in 1669, stood infeft in certain acres of the kirk-lands of Cambuslang, devised to him, his heirs, and assignies whatever; and, by deed of settlement in 1671, became bound and obliged to infeft his eldest son Thomas, and the heirs of his body; whom failing, his second son James, and the heirs of his body; whom failing, the other heirs to be procreated of his own body; whom failing, the bairns and heirs to be procreated of the body of Anna Johnston then his spouse, of any after-marriage; and it contained precept of seisin; but no actual infeftment was thereupon taken.

In 1692, Thomas the eldest son, who was heir under both deeds, viz. that of the investiture 1669, and that of the deed of settlement 1671, neglecting the last of these, which he was undoubtedly at liberty to have repudiated, or to have altered the same next day, compleated his title by special service as heir to his father; and being thereupon infeft,

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continued to possess till 1702, when, dying without issue, he was succeeded by his brother James, who, in like manner, completed his title by special service and infeftment as heir to his brother, and continued to possess till the year 1746, when he also died without issue; so that here was connected seifins proceeding upon retours standing together, cloathed with possession for near 60 years.

James Carbarns in 1743, executed a disposition of said lands in favours of William Smith his heir of line; and William Smith was thereupon also infeft.

By the death of this James Carbarns without issue, the line of succession, which hitherto had been the same under both deeds, came to divide; and the succession opened, under the settlement 1671, to Anne Skirving as heir to her mother Anne Johnston, and as such heir-substitute by the deed 1671. She made up her titles accordingly by service as heir of provision under that deed; and having made over her right to her son William Gray, he brought a process of reduction and declarator against William Smith the heir of line and disponee of James Carbarns.

One of the capital defences pleaded for Smith, was the positive prescription founded upon the second branch of the statute 1617, in respect that by the title-deeds, as above stated, it appeared that those lands had been possessed in fee-simple from the 1692 downwards, upon infeftments proceeding upon retours of special services, connected and standing together, which is all that the law required in case of heirs.

It was on the other hand contended for William Gray, and which is one of the points now specially pleaded for the respondents, That there were not *termini habiles* for prescription; that while both titles united in the same person, the one could not prescribe against the other; that both titles were equally good; that the possession was equally ascribable to both; that while matters continued in that state, the heir of provision was *non valens agere*; and therefore, that upon

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the failure of the nearer heirs, in whom both titles united, he could not be cut out from his right of succession as heir of provision.

The judgment your Lordships pronounced in that case, was in these words: "Repel the point of prescription, in respect that Thomas and James Carbarns who possessed by services as heirs of line, had also right to the disposition or tailzie made by old James Carbarns, the substitution in that deed being to them, and they understood to have possessed by virtue of all titles in their person, and there being no restriction, limitation, or prohibitory clause in the deed pursued on." A judgment in point, that while the two titles vested in one and the same person, and the one not more beneficial than the other, or any better right from thence accruing, no possession had thereon could be available to cut down by prescription the right of the heir of provision, which only took place upon the separation of the two lines; as indeed it would be very extraordinary, that a right should be lost by prescription before it accrued, or that one should forfeit his right for not doing what he had neither title nor interest to do.

The like judgment was given 22d November 1687, *Somervil contra Inglifton*; and 26th November 1728, *Frazer contra M'Kenzie*.

This leads the respondents, in the last place, to insist upon the exception, which they are advised the law admits of, in bar of every prescription, positive or negative, viz. *Quod contra non valentem agere non currit prescriptio*.

That the respondents had neither titles or interest to challenge the way and manner that George Muirhead made up his titles, is plain as any mathematical proposition. There must be a right to found an action of any kind. The respondents had a bare hope or expectancy of succession. This gave them no immediate right. And if they

they were not in condition to have interrupted the prescription, they cannot conceive how it is possible it should have run against them. George Muirhead had the whole rights arising from both titles in him, the one a proper title, the other an improper one. How to qualify a positive prescription, in such case, against persons *non valentes agere*, where the right did not accrue to them till after George Muirhead's death, quite surpasses the respondents comprehension.

The petitioner maintains, that the exception of *non valens agere*, does not apply to the positive, but only to the negative prescription, for which he refers to the case of Achluncart, observed by Lord Fountainhall, 31st December 1695.

From looking into the case, it appears, that it has little or no connection with the present. The debate is very imperfectly stated, and the learned collector observes, that the judgment which found a tailzie or settlement *of lands* could not be cut off by the negative prescription in that particular case, was carried by a very narrow majority; so that no great stress can be laid upon it.

No reason can be assigned, why that exception ought not to protect in the one prescription as well as the other. Minority applies equally to both; the *ratio legis* is the same in both; and to forfeit a person of a right for some neglect before he had it, is certainly most absurd. And in confirmation of this, the respondents beg liberty to refer to the case of D. of Lauderdale *contra* E. Tweedale, 25th January 1678, where the case is very fully stated and argued.

The decisions in the case of Mackerston, &c. do not in the least impeach this proposition. Heirs of entail, to the remotest generation, so soon as they exist, have a *jus crediti* vested in them, which intitles them to maintain every
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action necessary for preservation of *the right*. They may pursue for registration: They may oblige him to make up his titles upon the footing of the entail, and to purge the estate, if he has charged it with debts. But none of those, nor indeed any other action in law known to them, was competent at their instance, against Mr George Muirhead; and how they could have interrupted the prescription, otherwise than by an action, which required an antecedent right and title, is not extremely obvious.

In respect whereof, &c.

ALEX. LOCKHART.

